IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 18553 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GECALSTHOMINDIALTD & 1 - Petitioner(s)

Versus

HITENDRABHAIBANSIBHAIJOSHI - Respondent(s)

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Appearance :
MR KM PATEL for Petitioner(s) : 1 - 2.
MR KEDAR B BINIWALE for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 05/10/2005

ORAL JUDGMENT

Rule. Learned advocate Mr.Biniwale waives service of notice of rule on behalf of the respondent. At the joint request of the learned advocates appearing for the parties, the petition is taken up for final disposal

today.

2. In the present petition, the petitioners have challenged the legality of the award dated 5th April 2005 passed by the Labour Court, Vadodara.

3. Short facts leading to the present petition are that the respondent raised an industrial dispute before the Labour Court, Vadodara complaining about the illegal termination by the petitioners. It was the case of the respondent that he was engaged by the petitioners since 20th December 1988 and his services were illegally terminated without following any procedure with effect from 1st December 1995. Before the Labour Court, the stand of the petitioners was that the respondent was never employed by the petitioners, that there was no employer-employee relationship and that the respondent was providing service of liaisoning and consulting. It was contended that towards such services provided by the respondent, he was being paid service charges and other expenses. It was contended that on account of differences between the parties regarding service charges and other expenditures, the respondent stopped working for the petitioners.

4. The Labour Court by its impugned award allowed the reference. The Labour Court found that the respondent was employed by the petitioners, that his services were illegally terminated and that procedure under section 25-F of the Industrial Disputes Act was not followed. The Labour Court, therefore, directed reinstatement of the respondent with full backwages. In coming to the above conclusions, the Labour Court considered the documents produced by the respondent on record and the evidence led on behalf of the respondent. The Labour Court also noted that the petitioners had not examined any witness nor produced any documents.

5. Learned advocate Shri Patel appearing for the petitioners submitted that there was no material on record to establish employer-employee relationship between the parties. He contended that the Labour Court committed grave error in concluding that the respondent was employed by the petitioners. He submitted that the Labour Court proceeded on the basis that the burden of proof is on the petitioner to establish that the respondent was not employed by the petitioners. It was submitted that when the respondent had approached the

Labour Court contending that he was employed by the petitioners and thereafter illegally terminated, the burden was on the respondent to first establish that he was in the services of the petitioners.

5.1 It was contended that the Labour Court committed serious error in appreciating the material on record. It was contended that the documents produced by the respondent under no circumstances would establish that he was employed by the petitioners. It was further contended that the respondent was only providing liaisoning services and that he was paid for such services and was also reimbursed for the actual expenses. It was contended that the certificates issued by the officers of the petitioner company would not establish that the respondent was in service of the petitioner Company.

5.2 Reliance was placed on a decision of the Hon'ble Supreme Court in the case of Workmen of Nilgiri Coop Mkg. Society Ltd v. State of T.N., (2004) 3 SCC 514 to contend that there was no employer-employee relationship between the parties. My attention was drawn specifically to the observations made by the Hon'ble Supreme Court in

para 32 and 37 of the said decision which read as follows:

> “32. Determination of vexed questions as to whether a contract is a contract of service or contract for service and whether the employees concerned are employees of the contractors has never been an easy task. No decision of this Court has laid down any hard-and-fast rule nor is it possible to do so. The question in each case has to be answered having regard to the fact involved therein. No single test – be it control test, be it organisation or any other test – has been held to be the determinative factor for determining the jural relationship of employer and employee.
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> 37. The control test and the organisation test, therefore, are not the only factors which can be said to be decisive. With a view to elicit the answer, the court is required to consider several factors which would have a bearing on the result: (a) who is the appointing authority; (b) who is the paymaster; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job e.g. Whether it is professional or skilled work; (g) nature of establishment; (h) the right to reject.”

Pointing out the observations made by the Hon'ble Supreme

Court in para 47 of the said decision, it was contended that the burden to prove the existence of employer-employee relationship is on the person setting up such a plea.

5.3 Learned advocate Shri Patel also drew my attention to the conclusions of the Hon'ble Supreme Court in para 62 of the judgment wherein on the basis of the evidence on record, it was held that in that case there was no employer-employee relationship between the Workmen of Nilgiri Co-op. Marketing Society and the Cooperative Society.

5.4 With respect to the question of burden of proof being on the respondent to establish that he was employed by the petitioner, there cannot be any doubt. However, the above-mentioned decision of the Hon'ble Supreme Court pertains to the question where the workmen were employed through contractors and were contending that the contract was a sham and in reality the workmen were the direct employees of the principal employer. In the present case, the question is whether the respondent was actually engaged by the petitioners or not and whether he was in service of the petitioners or not. In this

regard, in para 50 of the judgment, the Hon'ble Supreme Court observed as follows:

> “The question whether the relationship between the parties is one of employer and employee is a pure question of fact and ordinarily the High Court while exercising its power of judicial review shall not interfere therewith unless the finding is manifestly or obviously erroneous or perverse.”

5.5 Reliance was placed on a decision of the Hon'ble Supreme Court in the case of Punjab National Bank v. Ghulam Dastagir, AIR 1978 SC 481. In the said decision, the Hon'ble Supreme Court held the personal driver of the Area Manager of the Nationalised Bank is not a person employed by the Bank. In the present case at no stage have the petitioners set up a theory that the respondent was engaged by any of its officers for his personal requirement. In fact, as noted earlier, theory of the petitioners is that the respondent was engaged for liaison work of the petitioners. This decision, therefore, would not apply to the facts of the present case.

5.6 Reliance was also placed on a decision of the Hon'ble Supreme Court in the case of Management of

Sonepat Coop. Sugar Mills Ltd v. Ajit Singh, 2005-I LLJ 1122 wherein in para 22 the Hon'ble Supreme Court observed that the jurisdiction of the Industrial Court to make an award in the dispute would depend upon a finding as to whether the concerned employee was a workman or not. When such an issue is raised, the same being jurisdictional one, the findings of the Labour Court in that behalf would be subject to judicial review.

5.7 Reliance was placed on the decision of the Hon'ble Supreme Court in the case of Ram Singh v. Union Territory, Chandigarh, (2004) 1 SCC 126 wherein the Hon'ble Supreme Court discussed the various tests to be applied for determination of the employer-employee relationship. In the said case, the Hon'ble Supreme Court was considering the question of employer-employee relationship when the workmen were contending that in fact they were the employees of the principal employer though engaged through contractor which was only a camouflage.

5.8 Reliance was placed on the decision of the Hon'ble Supreme Court in the case of Mukesh K. Tripathi v. Senior Divisional Manager, LIC, (2004) 8 SCC 387 in

which Hon'ble Supreme Court observed that an apprentice claiming the status of a workman, the burden is on him to establish such a fact.

5.9 Learned advocate Shri Patel further contended that in the facts of the present case, even if the Court comes to the conclusion that the respondent was employed by the petitioners and that his services were illegally terminated, reinstatement with full backwages would not be justified. It was contended that when the petitioners have been contending that the respondent was engaged only for liaison work and when the petitioners no longer require his service, direction for reinstatement with full backwages should be substituted by an order for compensation. Shri Patel has pointed out that in the case of Rattan Singh v. Union of India, (1997) 11 SCC 396, the Hon'ble Supreme Court had directed payment of compensation of Rs.25,000/- in lieu of reinstatement and backwages. Similar is the case in Employers v. Union of India, 2005-I LLJ 552.

6. On the other hand, learned advocate Shri Biniwale appearing for the respondent submitted that the Labour Court has not committed any error in allowing the

reference and no interference is therefore called for in the award. He submitted that the Labour Court considered the evidence on record and came to factual findings which are not perverse and therefore should not be interfered with by this Court. He pointed out that the respondent had led cogent evidence to establish his case that he was engaged by the petitioners continuously from 1988 till 1995 and that there was voluminous evidence in the form of oral as well documentary evidence to establish such a case. He pointed out that the petitioners led no evidence before the Labour Court.

7. Having considered the rival submissions, it can be seen that the central question involved in the present case is whether the respondent was employed by the petitioners or whether he was engaged only to provide for liaison service without there being any employer-employee relationship. At the outset, it can be seen that this is a pure question of fact. The question, therefore, is whether there was some material before the Labour Court to conclude that the respondent was employed by the petitioners. If answer to such a question is in the affirmative, this being a question of fact, this Court would not exercise its powers under Article 227 of the

Constitution of India to interfere with such a factual finding since the conclusions of the Labour Court in such a case would not be perverse.

8. I have examined the material on record at some length. Learned advocates appearing for the parties pointed out the evidence which was on record. The respondent had examined himself before the Labour Court and had produced several documents in support of his case. He had also examined one Shri K.P.Pandya who had worked as a Resident Engineer of the petitioner No.1 Company in the year 1990-91. The respondent had also produced several documents on record. All these documents were exhibited unopposed. On the other hand, the petitioners had neither produced documents nor examined any witness before the Labour Court.

9. Before the Labour Court, the respondent stated on oath that he was engaged in the clerical cadre on 20th December 1988. He was receiving salary of Rs.600 at that time in addition to other allowances. He stated that his services were terminated from 1.12.95. He had issued a notice dated 10th November 1995 for being paid HRA and other benefits which were being paid to other

employees. He stated that the said notice was not replied to by the petitioners. On 1.12.95 he was turned away from the gate stating that the Company did not require his services. Thus after a period of seven years of service, he was orally terminated. He stated that he performs religious rituals and earns about Rs.15 per day. This witness was cross-examined by the petitioners. In his cross-examination he agreed that in the documents which he had produced, it is not written that he was in the service of the Company. He denied that he was engaged on contractual basis by the petitioners for providing liaison work.

10. The respondent also examined one Shri K.P.Pandya as his witness. He supported the case of the respondent. He stated that along with him, there was another officer Shri Bhattacharya in the Company. He stated that the respondent was receiving salary on vouchers. He was cross-examined by the petitioners. He denied the suggestion that he was wrongly supporting the respondent.

11. In addition to the oral evidence before the Labour Court, there were several documents produced by the respondent. At Ex.12, there was a letter written by

the Area Manager Shri A.N.Pandya on 22nd September 1990 in which it was stated that Shri Joshi Hitendrabhai Bansibhai (respondent herein) was working with the General Electric Company of India Ltd. under the Area Manager since 20th December 1988 and his nature of work involved liaisoning with Government organizations, follow up for payments and other day today routine office matters including petty cash. It is also stated that he was found to be receptive to the job with sincerity and punctuality and honesty was his biggest asset to offer. Ex.15 is a letter written by the Resident Engineer of petitioner No.1 Company Shri Bhattacharya on 1st April 1993 to the Senior Security Officer of the Gujarat Electricity Board. In the letter, it was stated that Shri H.B.Joshi is representing the Company for day to-day official work with GEB Head Office, Baroda and that he may be allowed to enter the premises of GEB. The respondent also produced several vouchers of having received amounts periodically from the petitioners. One such voucher could be found at Ex.16 which is dated 18.4.89 and by which payment of Rs.1263 was received by the respondent. This amount included service charges of Rs.450/- for the period between 16.10.89 to 31.10.89. The respondent also produced other documents including a

copy of acknowledgment which the respondent gave to the Gujarat Electricity Board for having received a cheque of Rs.57,258/- paid by GEB to petitioner No.1 Company towards reimbursement of stamp duty for ICICI promissory note paid on behalf of GEB. There are several other documents in which the respondent had acted on behalf of the petitioners in some form other the other.

12. The Labour Court in its impugned award has discussed certain aspects of the evidence. The Labour Court observed that the respondent had produced 24 documents. They have been exhibited. From the documents, it appeared that the respondent was employed by the petitioners. The Labour Court observed that though it is the case of the petitioners that as an international company, the petitioners would not be employing any person without written appointment order, the petitioners have also not produced any document to point out that the respondent was engaged for the work of liaisoning or consulting for the petitioners.

13. As noted earlier, the record contained not only the depositions of the respondent and his witness who was admittedly working as a Resident Engineer of the

petitioners at the relevant time, but there are other documents also to establish that the respondent was discharging some duties for the petitioners. As noted earlier at Ex.12, the then Area Manager Shri A.N.Pandya certified that the respondent was working with petitioner No.1 company under the Area Manager in Baroda. The date of his engagement was also specified. The nature of work was also indicated. It was also stated that he was found to be receptive to the job. He was sincere, punctual and honest. The Resident Engineer Shri Bhattacharya also requested the Gujarat Electricity Board to permit the respondent to enter their office as he was representing the Company for day-to-day official work. Several vouchers of having received payments from the petitioners were produced by the respondent. These payments have been received from different officers. Most of these payments have been received from Shri Bhattarchaya. But some of the payments have also been made by Shri Pandya. It can thus be seen that there was sufficient evidence on record to permit the Labour Court to conclude that the respondent was engaged by the petitioners. Narration of the Labour Court that the petitioners failed to establish that the respondent was not engaged or that the respondent was engaged only for

the liaisoning work would not vitiate the order since, if the award is read as a whole, I do not agree with the suggestion of the learned advocate for the petitioners that the entire burden to prove in the negative that the respondent was not engaged by the petitioners was thrown on the petitioners. The Labour Court was only considering as an additional factor the effect of the petitioners not producing any material at all to establish that the respondent was providing only liaisoning service. In fact, the logic of the Labour Court cannot be faulted. When the petitioners contended that the respondent's theory of employment with the petitioners is to be discarded, since a well-regulated company would not engage any workman without a written appointment order, it was equally important that the petitioners should be able to produce some documents or order in writing by which the liaisoning work was entrusted to the respondent. If the petitioners were a well regulated company engaging all workmen only through written appointment orders, it is difficult to believe that liaisoning work was entrusted to an individual for years together without any written agreement thereof. In nut-shell, I find that the factual averments of the Labour Court cannot be categorized as perverse. In view

of the fact that the respondent was held to have been engaged by the petitioners from December 1988 till his termination in December 1995, and that such termination was not preceded by any formality under the provisions of section 25-F of the Industrial Disputes Act, setting aside of such termination cannot be found fault with. The contention of the learned advocate for the petitioners that if the Resident Engineer of the petitioner No.1 company engaged the respondent unauthorizedly, the petitioner Company cannot be held responsible for such an action cannot be accepted. Firstly, such a contention was never raised either in the written statement or through any other mode before the Labour Court. Secondly, the respondent had received payments from various officers of the Company. At no stage, petitioner No.1 Company objected to such an arrangement and thirdly it is not possible to believe that over a period of five years a Resident Engineer was allowed to engage a person for liaisoning work unauthorizedly especially in absence of any evidence on record to that effect. I am also unable to agree with the suggestion of the learned advocate for the petitioners that in the facts of the present case the proper course to be adopted would be to award compensation not reinstatement or backwages. No

special features have been brought on record to take such a course of action.

14. At this stage, learned advocate Shri Patel submits that in any case this is not a case where reinstatement with 100 per cent backwages should be granted. He submitted that petitioner No.1 Company does not require the service of the respondent. Instead of directing reinstatement and backwages, the proper course would be to provide for compensation in lieu of reinstatement and backwages. Learned advocate Shri Biniwale appearing for the respondent submitted that the respondent would be ready and willing to accept lump sum compensation in lieu of reinstatement and backwages.

15. Considering the fact that even as per the respondent there was some evidence on record to suggest that during the entire interregnum period, he was not unemployed, even otherwise direction for 100 per cent backwages would not be justified. Considering the overall facts and circumstances and considering the suggestion and concession of the learned advocate for the respondent, it is provided that instead of reinstatement and backwages, the respondent would be entitled to

receive compensation of Rs.1,50,000/- (Rupees one lac and fifty thousand) by way of full and final settlement of all his claims against the petitioner. This figure is arrived at considering the last drawn wages of the respondent being Rs.1200 per month and the suggestion of the learned advocate Shri Biniwale that the respondent would be satisfied with salary for the intervening period on the basis of last drawn salary in lieu of reinstatement and backwages. With the clarification that the above figure will include all claims of the respondent against the petitioners, this petition is disposed of with the above directions. Rule is made absolute to the limited extent as above.

(Akil Kureshi, J.)

(vjn)